

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

NICHOLAS S. ROY,

Plaintiff,

v.

VICTORIA BARSHAW, *et al.*,

Defendants.

Case No. C06-5296FDB

ORDER DIRECTING PLAINTIFF  
TO SUBMIT AN AMENDED  
COMPLAINT OR SHOW CAUSE  
WHY MATTER SHOULD NOT  
BE SUMMARILY DISMISSED

The Court, having reviewed plaintiff's complaint and the balance of the record contained herein, does hereby find and ORDER.

(1) A complaint is frivolous when it has no arguable basis in law or fact Franklin v. Murphy, 745 F.2d 1221, 1228 (9th Cir. 1984). When a complaint is frivolous, fails to state a claim, or contains a complete defense to the action on its face, the court may dismiss an *in forma pauperis* complaint before service of process under 28 U.S.C. § 1915(d). Noll v. Carlson, 809 F.2d 1446, 575 (9th Cir. 1987) (*citing Franklin v. Murphy*, 745 F.2d 1221, 1228 (9th Cir. 1984)).

(2) Plaintiff's § 1983 complaint appears to call into question the validity of his conviction and/or sentence. In June 1994, the United States Supreme Court held that "[e]ven a prisoner who has fully exhausted available state remedies has no cause of action under § 1983 unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus." Heck v. Humphrey, 114 S.Ct. 2364, 2373 (1994). The court added:

Under our analysis the statute of limitations poses no difficulty while the state challenges are

1 being pursued, since the § 1983 claim has not yet arisen. . . . [A] § 1983 cause of action for  
2 damages attributable to an unconstitutional conviction or sentence does not accrue until the  
conviction or sentence has been invalidated.

3 Id. at 2374.

4 Plaintiff claims he was retaliated against when his sentence was recalculated, adding eight months  
5 to his criminal sentence. The issues raised related to this claim clearly affect the term of plaintiff's  
6 sentence and thus, should be considered only in a petition for writ of habeas corpus.

7 (3) Due to the deficiencies described above, the court will not serve the complaint. Plaintiff shall  
8 file an amended complaint, curing, if possible, the above noted deficiencies, or show cause why this matter  
9 should not be dismissed **by no later than September 1, 2006**. If an amended complaint is not timely  
10 filed or if plaintiff fails to adequately address these issues, the Court will recommend dismissal of this  
11 action as frivolous pursuant to 28 U.S.C. § 1915, and such dismissal will count as a "strike" under 28  
12 U.S.C. § 1915(g).

13 (4) The Clerk is directed to send plaintiff a copy of this Order and the General Order

14 DATED this 2<sup>nd</sup> day of August, 2006.

15  
16 /s/ J. Kelley Arnold  
17 J. Kelley Arnold  
18 United States Magistrate Judge  
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